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No. 88-1618

In The

Supreme Court of the United States

October Term, 1988

Ernest V. PARISIEN,
D/B/A PARISIEN EXCAVATION,

Petitioner,

v.

TWIN CITY CONSTRUCTION COMPANY
OF FARGO, et al.,

Respondents.

**Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICI CURIAE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS, THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, et al., (additional amici listed inside) IN SUPPORT OF PETITIONER

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Mississippi Band of Choctaw Indians;
Pueblo de Cochiti;
Red Lake Band of Chippewa Indians;
Saginaw Chippewa Indian Tribe;
Saint Regis Mohawk Tribe;
Winnebago Tribe of Nebraska;
National Indian Justice Center

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Pursuant to Rule 36.1, *amici curiae* consisting of fifteen (15) federally recognized Indian tribes, and one national Indian organization, respectfully move this Court for leave to file the attached brief *amici curiae* in support of Ernest V. Parisien's petition for a writ of *certiorari* in the above-captioned case. Petitioner consents

but respondent Twin City Construction Company of Fargo objects to the filing of the brief of *amici*, and therefore this motion is necessary.

Amici have a substantial interest in the resolution of the issues raised by petitioner in this case. The result of the equally divided *en banc* Eighth Circuit Court of Appeals seriously erodes tribal sovereign rights and threatens effective protection of the rights of all individuals, Indian and non-Indian, on Indian reservations. The interest of the *amici* is described more fully in their proposed brief attached to this motion.

Amici submit the attached brief to assist in showing the Court that the issues presented by the petition are of substantial importance. Such issues involve tribal court jurisdiction over reservation-based civil actions brought by tribal members against non-Indians; and the extent to which federal courts are bound by decisions of the highest tribal courts on issues of purely tribal law. These issues go to the heart of the ability of Indian tribes to be self-governing within their reservations. They are important issues throughout Indian country.

Respectfully submitted,

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INTEREST OF THE AMICI CURIAE

Amicus curiae, the Turtle Mountain Band of Chippewa Indians (the Tribe), is a federally-recognized Indian tribe, organized under a constitution approved by the United States Secretary of the Interior on June 16, 1959. The Tribe has about 25,000 members. Over 10,000 members live on

or near the Tribe's 33,000 acre Reservation. The Reservation is located entirely within the state of North Dakota.[1]

The other *amici* tribes are federally-recognized Indian tribes located throughout the United States. The National Indian Justice Center is an Indian owned and operated non-profit organization created in 1983. The Center provides technical assistance to tribal courts in their administration of justice throughout Indian country.

Amici oppose the result below holding that tribal courts lack jurisdiction over a civil action, brought by a tribal member against a non-Indian, which action arose out of the on-reservation performance of a federal contract to build a tribal school on tribal land for attendance primarily by Indian students. On most Indian reservations, the presence of non-Indians, especially those doing business with tribal members, is an everyday fact of life. The authority of tribal courts to resolve disputes arising out of the activities of non-Indians on tribal land and involving tribal members, is crucial. Without this authority, tribes cannot adequately protect and enforce the rights under federal law and tribal law of all people on their reservations.

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[1] The Tribe's constitution expressly provides for the creation of a tribal court system. T.M.C. Const. art. IX, § 5. In addition, the Tribe has a written Law and Order Code which was approved by the Secretary of the Interior in March, 1976. T.M.C.T.C. (1976). The Code includes sections on civil procedure, 2 T.M.C.T.C. §§ 2.0101 – 2.1501, and evidentiary rules, 3 T.M.C.T.C. §§ 3.0101 – 3.0316, in tribal court.

SUMMARY OF REASONS FOR GRANTING THE WRIT

It is well-established that tribal courts have exclusive jurisdiction under federal law over reservation-based civil actions brought by non-Indians against tribal members. The result below holds that tribal courts lack jurisdiction over the reverse situation – a reservation-based civil action brought by a tribal member against a non-Indian. There is no valid reason for distinguishing the situations, and therefore the result below is in error.

It is implicit in decisions of this Court and federal policy that federal courts must defer to judgments of tribal courts. But the federal district court in this case substituted its own interpretation of an issue of purely tribal law for that of the tribal court of appeals. That lack of deference is intolerable. It threatens tribal self-determination as provided for by Congress and as interpreted by this Court. It in effect renders the Indian abstention and exhaustion doctrines announced by this Court nugatory. It implies that tribal courts are incapable of construing their own laws, despite many decisions of this Court upholding their competency and integrity.

This Court should grant review in this case to bring the result below in line with its decisions in the area of tribal court civil jurisdiction, and with the federal policy of encouraging tribal self-determination and self-government.

REASONS FOR GRANTING THE WRIT

Amici adopt the reasons for granting the writ as set forth by petitioner in his petition for a writ of *certiorari*. In

addition, *amici* offer the following reasons for granting *certiorari* in this case.

I. THE RESULT BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *WILLIAMS V. LEE.*

Thirty years ago, in the seminal case of *Williams v. Lee*, 358 U.S. 217 (1959), this Court held that exclusive jurisdiction over reservation-based civil actions by non-Indians against tribal members is in the tribal courts. 358 U.S. at 223. Since that decision, *amici* and other Indian tribes have been exercising jurisdiction over reservation-based civil actions by non-Indians against tribal members under *Williams v. Lee*, a case which this Court has repeatedly cited with approval. *See, e.g., Montana v. United States*, 450 U.S. 544, 564-566 (1981). Petitioner's case is the mirror image of *Williams v. Lee*; it involves tribal court jurisdiction over a reservation-based civil action by a tribal member against a non-Indian.

The *en banc* Court of Appeals for the Eighth Circuit has failed to uphold tribal court jurisdiction over petitioner's case. Such a result is irreconcilable with *Williams v. Lee*. There is no valid reason for upholding tribal court jurisdiction over *Williams v. Lee*-type situations involving a non-Indian plaintiff and an Indian defendant, and denying tribal court jurisdiction over those such as petitioner's case involving an Indian plaintiff and a non-Indian defendant. This Court should grant review in this case to bring the result below in line with the well-established holding of *Williams v. Lee*.

II. THE RESULT BELOW SANCTIONS THE FAILURE OF FEDERAL COURTS TO DEFER TO A TRIBAL COURT JUDGMENT, IN CONTRAVENTION OF DECISIONS OF THIS COURT AND FEDERAL POLICY REJECTING SUCH INTRUSIONS ON TRIBAL SOVEREIGNTY.

A. Substitution of Federal Court Judgments For Tribal Court Judgments On Tribal Law Issues Seriously Threatens Tribal Self-Determination And Cultural Integrity.

In this case, the Turtle Mountain Chippewa Court of Appeals construed a provision of the Turtle Mountain Chippewa Tribal Code. Ignoring the Tribal Court of Appeals' interpretation of the tribal code provision, the federal district court *substituted* its own interpretation of the provision. This substitution is an extremely serious affront to tribal self-determination and self-government.

Where issues of purely tribal law are involved, substitution by federal courts of their own interpretations for the interpretations of tribal courts is inherently and blatantly inconsistent with the federal policy of encouraging tribal self-determination. In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (*Martinez*), this Court precluded federal judicial review of tribal court decisions interpreting the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, except as expressly provided for by writs of habeas corpus. 436 U.S. at 59-72. The Court found that Congress had specifically considered and rejected such review on the grounds that it would "intrude needlessly on tribal self-government," *Id.* at 71, and in particular it would "displace tribal courts." *Id.* at 67.

The Court in *Martinez* noted that issues under the Indian Civil Rights Act, especially those "likely to arise in

a civil context, will frequently depend on questions of tribal tradition and custom which tribal forums may be in a better position to evaluate than federal courts." *Id.* at 71. Therefore, "efforts by the federal judiciary to apply the statutory prohibitions of § 1302 in a civil context may substantially interfere with a tribe's ability to maintain itself as a culturally and politically distinct entity." *Id.* at 72.

The reasoning of *Martinez* applies even more forcefully in this case. If federal courts may not substitute their interpretations of federal law under the Indian Civil Rights Act for those of tribal courts, *a fortiori* they may not substitute their interpretations of purely tribal law. Such substitutions, as *Martinez* recognizes, would completely undermine tribal sovereignty and erode tribal culture.

This principle of federal court restraint in reviewing tribal court decisions interpreting tribal-made law also underlies this Court's decision in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987) (*Iowa Mutual*). *Iowa Mutual* extended the Indian abstention and exhaustion doctrines to cases brought under the federal diversity statute, 28 U.S.C. § 1332. This Court therein reaffirmed that a "federal court's exercise of jurisdiction over matters relating to reservation affairs can also impair the authority of tribal courts. . . ." 480 U.S. at 15. "Adjudication of such matters by any nontribal court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16. "Unless a federal court determines that the Tribal Court lacked jurisdiction, however, proper deference to the tribal court system precludes relitigation of issues raised . . . and resolved in the Tribal Courts." *Id.* at 17.

Plainly, the result below is contrary to decisions such as *Martinez* and *Iowa Mutual* recognizing the "federal policy of deference to tribal courts" concerning the interpretation and application of tribal law. *Iowa Mutual*, 480 U.S. at 17.[2] This Court should grant review in this case to establish the principle that federal courts must defer to tribal court decisions on purely tribal law issues, and to establish an appropriate standard of deference consistent with its cases and federal policy. For tribes throughout the country, with ever-growing bodies of tribal law, such principles and standards are vital to maintaining their political and cultural independence.[3]

B. The Failure Of Federal Courts To Accord Any Deference To Tribal Court Judgments Renders The Indian Abstention And Exhaustion Doctrines Superfluous.

Besides being irreconcilable with *Williams v. Lee*, and the longstanding congressional policy of respecting tribal self-determination, the result below is inconsistent with the Indian abstention and exhaustion doctrines announced by this Court in *National Farmers Union Ins.*

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[2] In addition, as Petitioner points out, the result below directly conflicts with a decision of the Court of Appeals for the Ninth Circuit holding that decisions of the highest tribal court on issues of purely tribal law are binding on the federal courts. *Sanders v. Robinson*, 864 F.2d 630, 633 (9th Cir. 1988).

[3] *See, e.g., FMC Corp. v. Shoshone-Bannock Tribes*, No. 87-4059 (D. Idaho Apr. 14, 1989) (citing *Sanders v. Robinson* with approval); *but cf. Crow Tribe of Indians v. United States*, No. 78-110 (D. Mont. Mar. 15, 1989) (holding that where a federal court action is not a direct appeal from tribal court, a ruling on tribal law by a tribal court in a separate action has no binding effect on the federal court).

Cos. v. Crow Tribe, 471 U.S. 845 (1985) (*National Farmers*) and *Iowa Mutual*.

In *National Farmers*, this Court held that federal courts must abstain from exercising jurisdiction over challenges to tribal jurisdiction based on specific federal statutes or treaties, until tribal remedies have been exhausted. 471 U.S. at 853-855. This holding, reasoned the Court, is most consistent with the federal policy of encouraging tribal self-government and self-determination. *Id.* at 856. It also will permit tribal courts to develop a "full record" on their jurisdiction. *Id.* at 856-857. Other courts will benefit from the record and the expertise of tribal courts in the area of tribal jurisdiction, if review of tribal decisions occurs. *Id.* at 857.

The Indian abstention and exhaustion doctrines were extended to federal diversity cases in *Iowa Mutual*. 480 U.S. at 16-17. In so holding, the Court recognized the "vital role" that tribal courts play – as supported by federal policy – in tribal self-government over reservation affairs, including the activities of non-Indians. *Id.* at 14. "Regardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the Tribal Court a 'full opportunity to determine its own jurisdiction.' " *Id.* at 16.

Hence, *National Farmers* and *Iowa Mutual* establish review of tribal court decisions on the record. *National Farmers*, 471 U.S. at 856-857; *Iowa Mutual*, 480 U.S. at 16-17. The clear implication from these decisions is that federal courts must defer to tribal decisions. The complete failure of the federal district court in this case to

accord any deference to the tribal court judgment on the tribal law issue, as well as on the federal law issue, in effect renders the abstention and exhaustion doctrines superfluous.[4]

C. The Lack Of Deference Also Implies That Tribal Courts Are Incompetent, An Implication Soundly Rejected By This Court.

The result below is also an affront to the integrity and competence of tribal courts. The federal district court, in substituting its interpretation of tribal law for that of the Tribal Court of Appeals, refused to accord any deference to the interpretation of the Tribal Court of Appeals regarding its own law. The inescapable implication of the decision is that tribal courts are not to be trusted to interpret their own tribal laws, not to mention federal laws applicable to the Tribe. Such implication is completely contrary to decisions of this Court avowing its belief in the integrity and competence of tribal courts.

Just this term, in *Mississippi Band of Choctaw Indians v. Holyfield*, ___ U.S. ___, 109 S.Ct. 1597 (1989) (*Holyfield*), the

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[4] *Amici* recognize that, in addition to the issue of the binding effect of tribal court decisions on tribal law, this case presents an issue of the deference federal courts should accord tribal court decisions on federal law. *Amici* submit that decisions of this Court, and federal policy, support a standard of deference to tribal decisions on federal law which may, in some instances, be less strict than the standard applicable to tribal court decisions on issues of purely tribal law. Nevertheless, the federal district court's refusal to give any deference to the Tribal Court of Appeals on the tribal law issue in itself renders the decision below in error and worthy of review by this Court.

Court held that under the Indian Child Welfare Act, 25 U.S.C. § 1911(a), exclusive jurisdiction over custody proceedings involving Indian children born off the reservation is in the tribal courts. In so concluding, the Court expressly stated that, as to the ultimate placement of the children, "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts. . . ." *Holyfield*, 57 U.S.L.W. 4409, 4415 (U.S. Apr. 3, 1989).

Earlier, in *Martinez*, in refusing to permit federal judicial review of tribal court actions under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303, except by writs of habeas corpus, the Court stated, "[t]ribal forums are available to vindicate rights created by the ICRA, and . . . [t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians," 436 U.S. at 65, and as "competent law-applying bodies." *Id.*

Finally, in *Iowa Mutual*, this Court unequivocally reaffirmed its long-standing rejection of the argument that tribal courts are incompetent as a basis for denying tribal jurisdiction. 480 U.S. at 17-19. "We have rejected similar attacks on tribal court jurisdiction in the past." *Id.* at 19. Such allegations are "contrary to the congressional policy promoting the development of tribal courts." *Id.*

The result below is contrary to all of these cases acknowledging the integrity and competency of tribal courts. Review should be granted to bring it in line with this Court's previous decisions, and with the federal policy of encouraging tribal self-government within Indian reservations.

CONCLUSION

For the reasons stated above, this Court should grant *certiorari* to review the *en banc* judgment of the equally divided Eighth Circuit Court of Appeals.

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